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Messrs Firdaus Azlina & Co v Tunas Selatan Construction Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCvC-452–07 OF 2013
YEOH WEE SIAM J
24 OCTOBER 2013

Civil Procedure — Summary judgment — Claim for professional fees, charges and disbursements for work carried out — Allegation appointment made orally — Confirmation of appointment — Whether confirmed — Appointment on success basis — Whether applicant successful in tender to be appointed as lawyers for project — Whether there was agreement for payment of fees — Whether fees manifestly excessive, unfair and unreasonable — Legal Profession Act 1976 s 128 — Application to enter final judgment — Rules of Court 2012 O 14 r 1

This was the plaintiff's notice of application under O 14 r 1 of the Rules of Court 2012 ('ROC') to enter final judgment against the defendants for the sum of RM3,713,150 ('the amount claimed') being the professional fees, charges and disbursements for work carried out for a project known as 'Cadangan Pembangunan 'Knowledge Hub in Johor' at Lanadron, Pagoh, Johor' ('the project'). The plaintiff submitted that the appointment were made orally ('the alleged appointment') and that the latter was obliged to pay the plaintiff the amount claimed pursuant to s 128(2) of the Legal Profession Act 1976 ('Act') since there was no application to the court by the defendants after the expiry of 12 months from the date when the note of charges was delivered by the plaintiff. The defendants contended that there was no such alleged appointment as the appointment would actually be on a success basis. The defendants submitted that the plaintiff was unsuccessful in its tender to be appointed as lawyers for the project. In its counterclaim, the first defendant applied for a declaration that there was no agreement for the payment of fees by the first defendant to the plaintiff. Alternatively, the defendant counterclaimed for a declaration that the alleged fees of the plaintiff were manifestly excessive, unfair and unreasonable and consequently, an order directing the plaintiff to tax the alleged fees pursuant to s 128 of the Act.

Held, dismissing the application:

(1) The texted or SMS messages produced by the plaintiff revealed that the plaintiff kept asking for a confirmation of their appointment. This clearly showed that the alleged appointment was not confirmed by the defendants. The plaintiff was unable to show any contemporaneous document confirming the alleged appointment (see para 12).

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(2) The plaintiff had participated in the second defendant's tender exercise but failed its bid. If the plaintiff had been duly appointed under the alleged appointment, the plaintiff would have objected to the tender exercise. However, the plaintiff did not do so. Instead, the plaintiff participated in the tender exercise. Since ZACO was ultimately appointed, it raised the question of whether there was in fact the alleged appointment of the plaintiff by the defendants in the first place. The plaintiff could not show proof that after the tender exercise, there were further instructions from the defendants to the plaintiff to finalise the concession agreement (see paras 17–18).

(3) This was not an application under O 14A of the ROC but one under O 14 r 1 of the ROC. It would be wrong to grant summary judgment merely based in the interpretation and application of ss 124, 126 and 128 of the Act. It was not true that the defendants did nothing when it received the note of charges from the plaintiff. The defendants had immediately responded to the plaintiff's letter challenging the plaintiff's note of charges (see para 22).

[Bahasa Malaysia summary

Ini adalah notis permohonan plaintif di bawah A 14 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk memasukkan penghakiman terhadap defendan-defendan untuk wang sejumlah RM3,713,150 ('jumlah yang dituntut') sebagai fi profesional, caj dan pembayaran untuk kerja yang dijalankan bagi projek yang dikenali sebagai 'Cadangan Pembangunan 'Knowledge Hub in Johor' di Lanadron, Pagoh, Johor' ('projek'). Plaintif berhujah bahawa perlantikan dibuat secara lisan ('perlantikan yang didakwa') dan bahawa defendan-defendan bertanggungjawab untuk membayar plaintif jumlah yang dituntut berikutan s 128(2) Akta Profesion Undang-Undang 1976 ('Akta') memandangkan tidak terdapat permohonan kepada mahkamah oleh defendan-defendan selepas tamat 12 bulan dari tarikh apabila nota caj dihantar oleh plaintif. Defendan-defendan berhujah bahawa tidak terdapat perlantikan yang didakwa sedemikian kerana perlantikan tersebut sebenarnya berdasarkan atas kejayaan. Defendan-defendan berhujah bahawa plaintif tidak berjaya dalam tendernya untuk dilantik sebagai peguam bagi projek tersebut. Dalam tuntutan balasnya, defendan pertama memohon untuk perisytiharan bahawa tiada perjanjian untuk bayaran fi oleh defendan pertama kepada plaintif. Secara alternatif, defendan menuntut balas untuk perisytiharan bahawa fi yang didakwa tersebut oleh plaintif adalah terlalu berlebihan, tidak adil dan tidak munasabah dan akibatnya, perintah mengarahkan plaintif untuk mencukaikan fi yang didakwa tersebut berikutan s 128 Akta.

Diputuskan, menolak permohonan:

(1) Teks atau mesej SMS yang dikemukakan oleh plaintif menunjukkan bahawa plaintif asyik bertanya untuk pengesahan perlantikan mereka.

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Ini jelas menunjukkan bahawa pelantikan yang didakwa tidak disahkan oleh defendan-defendan. Plaintif tidak dapat menunjukkan apa-apa dokumen semasa yang mengesahkan pelantikan yang didakwa tersebut (lihat perenggan 12).

(2) Plaintif telah mengambil bahagian dalam tender defendan kedua tetapi gagal dalam tawarannya. Jika plaintif dilantik di bawah pelantikan yang didakwa plaintif akan membantah kepada tender. Walau bagaimanapun, plaintif mengambil bahagian dalam tender tersebut. Memandangkan ZACO akhirnya dilantik, ia membangkitkan persoalan sama ada sebenarnya terdapat perlantikan plaintif yang didakwa tersebut oleh defendan-defendan pada mulanya. Plaintif tidak dapat menunjukkan bukti bahawa selepas tender tersebut, terdapat arahan selanjutnya daripada defendan-defendan kepada plaintif untuk menyelesaikan perjanjian konsesi (lihat perenggan 17–18).

(3) Ini bukan permohonan di bawah A 14A KKM tetapi satu di bawah A 14 k 1 KKM. Adalah salah untuk memberikan penghakiman terus hanya berdasarkan dalam tafsiran dan permohonan ss 124, 126 dan 128 Akta. Adalah tidak betul bahawa defendan-defendan tidak berbuat apa-apa apabila ia menerima nota caj daripada plaintif. Defendan-defendan dengan segera menjawab kepada surat plaintif membantah nota caj plaintif (lihat perenggan 22).]

Cases referred to

Kiwi Brand (M) Sdn Bhd v Multiview Enterprise Sdn Bhd [1998] 6 MLJ 38, HC (refd)

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183, SC (refd)

Sang Lee Co Sdn Bhd v Subramaniam a/l Mavawan & Ors [2011] 5 MLJ 374, CA (refd)

TAC Construction & Trading Sdn Bhd v Bennes Engineering Bhd [1999] MLJU 29; [1999] 2 CLJ 117, HC (refd)

Tetuan Putra Gill v Hijaz Refinery (Pahang) Sdn Bhd & Anor [2009] 7 CLJ 495, HC (refd)

Vije & Co v Co-Operative Central Bank Ltd [1991] 3 MLJ 432, HC (refd)

Legislation referred to

Legal Profession Act 1976 ss 124, 126, 126(1), 128, 128(2)
Rules of Court 2012 O 14 r 1, O 14A
Solicitors' Remuneration Order 2005 r 1 Sixth Schedule

Alan Adrian Gomez (Michelle Sunita Kummar with him) (Tommy Thomas) for the plaintiff.
Mohan Krishnan (Kumar Partnership) for the first defendant.

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Maidzura Mohammad (Charlaine Chin with her) (Raja Darryl & Loh) for the second defendant.

Yeoh Wee Siam J:

BACKGROUND FACTS

[1] In the plaintiff's statement of claim ('SOC') the plaintiff averred that the defendant have failed to pay the sum of RM3,713,150 ('the amount claimed') which are their professional fees, charges and disbursements for work carried out for a project known as *Cadangan Pembangunan* 'Knowledge Hub in Johor' at Lanadron, Pagoh, Johor ('the project'). The plaintiff has pleaded that their appointment as solicitors for the project was made orally pursuant to three meetings held between the plaintiff and the defendant ('the alleged appointment'). The plaintiff has also pleaded the particulars of work undertaken by the plaintiff in respect of the alleged appointment and that the defendant are obliged pursuant to s 128(2) of the Legal Profession Act 1976 ('LPA') to pay the plaintiff the amount claimed since there was no application for taxation to the court by the defendant after the expiry of 12 months from the date when the note of charges was delivered by the plaintiff (see paras, 5, 9, 12, 20, 24 and 25 of the SOC).

[2] The defendant contended that there was no such alleged appointment of the plaintiff. Instead, the plaintiff's appointment would be on a success basis ie the plaintiff's appointment would only be made upon the successful award of the project by the Public Private Partnership Unit ('UKAS') in the Prime Minister's Department, the execution of the concession agreement and all ancillary documents and subsequent sanction by the second defendant and the Government of Malaysia ('the government'). Pending the appointment, the consultants engaged for the project, including the plaintiff, participated at their own risk and costs should the project not take off and/or if the services of the consultant were no longer required for the project, or when the appointment of the consultant was not approved by the second defendant or the government (see para 1 of the first defendant's defence and paras 5.2, 6, 9 and 10 of the second defendant's defence).

[3] The plaintiff was unsuccessful in its tender to be appointed as lawyers for the project. Ultimately, Messrs Zainal Abidin & Co ('ZACO') was appointed as the legal consultant, and not the plaintiff.

[4] In the counterclaim, the first defendant applied for a declaration that there was no agreement for the payment of fees by the first defendant to the plaintiff (see paras 2, 3, 4, 7, 8 and 14(a) of the defence and counterclaim).

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[5] The alternative prayer in the counterclaim is for a declaration that the alleged fees of the plaintiff are manifestly excessive, unfair and unreasonable and, consequently, an order directing the plaintiff to tax the alleged fees pursuant to s 128 of the LPA (see paras 9, 10, 13 and 14(b) and (c) of the defence and counterclaim).

ENCLOSURE 6

[6] This is the plaintiff's notice of application ('application') under O 14 r 1 of the Rules of Court 2012 ('ROC') to enter final judgment against the first and second defendants for:

(a) the sum of RM3,713,150 ie the amount claimed which remains due and owing by the first and second defendants for professional legal fees of the plaintiff pursuant to the plaintiff's note of charges which was prepared and served on the first and second defendants on 27 March 2012 or any part thereof as is found by this honourable court to be due and owing;

(b) costs; and

(c) such further or other relief as this honourable court deems fit.

[7] The grounds of this application are that the first and second defendants have failed, neglected and/or refused to pay the plaintiff's note of charges of professional fees for legal services rendered to the first and second defendants; that the first and second defendants have not sought any order for taxation of the note of charges notwithstanding the lapse of one year, from 27 March 2012 to 27 March 2013, after the note of charges was served on them, and are therefore legally obliged to pay the sums claimed in the note of charges.

THE COURT'S DECISION GIVEN ON 9 OCTOBER 2013 REGARDING ENCL 6

[8] The plaintiff's application is dismissed. Costs of RM3,000 are to be paid by the plaintiff to the defendant jointly forthwith.

GROUNDS FOR THE COURT'S DECISION

[9] It is trite law that summary judgment can only be allowed in a plain case with no triable issues to warrant a full trial. An O 14 application serves the purpose of giving early judgment to a plaintiff who has a clear and undeniable claim. However, it is not intended to shut out a defendant who has a bona fide defence (see *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1998] 6 MLJ 38; [1987] 2 MLJ 183 (SC), *Kiwi Brand (M) Sdn Bhd v Multiview Enterprise Sdn Bhd* [1998] 6 MLJ 38 and *TAC Construction & Trading Sdn Bhd v Bennes Engineering Bhd* [1999] MLJU 29; [1999] 2 CLJ 117).

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[10] The defendant have raised several triable issues:

There is no written agreement for fees and/or appointment of the plaintiff by the defendant in respect of the project.

[11] The plaintiff pleaded that there was an oral agreement pursuant to the three meetings held on 14 September 2011, 13 October 2011 and 22 November 2011 ('the three meetings') for the purpose of confirming the alleged appointment of the plaintiff by the first defendant. The minutes of the three meetings were not produced. The burden of proof is on the plaintiff to show that they were duly appointed after the three meetings. Oral evidence must be adduced by the plaintiff's representatives, Azlina bte Jamaluddin ('Azlina') and Firdaus Khan bin Parit Khan ('Firdaus') and such witnesses have to be cross-examined.

[12] The texted or SMS messages produced by the plaintiff reveal that the plaintiff kept asking for a confirmation of their appointment. This shows clearly that the alleged appointment was not confirmed by the defendant.

[13] In *Sang Lee Co Sdn Bhd v Subramaniam a/l Mavawan & Ors* [2011] 5 MLJ 374 the Court of Appeal held that apart from the testimony required to establish an oral contract, the High Court ought to have tested the same against contemporaneous documents to support a finding that in all probability an oral contract existed.

[14] In the present case, apart from the bare statements of Azlina, the plaintiff is unable show any contemporaneous document confirming the alleged appointment.

[15] The plaintiff exhibited two quotations for the alleged appointment (exh AJ12) but there is no proof that the quotations have been confirmed or accepted by the defendant.

[16] The plaintiff embarked on the drafting of the concession agreement ('CA') based on the information given by the first defendant in a meeting on 14 September 2011 that the CA was between the joint venture company (JVC) to be set up, UKAS and the government to govern the management and implementation of the project. However, the concession company or third party ie the JVC, which would be executing the CA, and who allegedly should be paying the consultant's fees to the plaintiff, is not made a party to these proceedings (see the first defendant's affidavit in reply and para 2 of the first defendant's defence and counterclaim). The plaintiff was informed of its 'terms of involvement' by the first defendant but no letter of appointment was issued and no fees were agreed upon.

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[17] ZACO was finally appointed as the consultant, instead of the plaintiff, after being successful in its bid by tender for the appointment. The court notes that the plaintiff had also participated in the second defendant's tender exercise, but failed in its bid. If the plaintiff had been duly appointed under the alleged appointment, the plaintiff would have objected to the tender exercise. However, the plaintiff did not do so. Instead, the plaintiff participated in the tender exercise. Since ZACO was ultimately appointed, it raises the question whether there was in fact the alleged appointment of the plaintiff by the defendant in the first place.

[18] The plaintiff could not show proof that after the tender exercise, there were further instructions from the defendant to the plaintiff to finalise the CA. Another issue that arises is whether the plaintiff unilaterally finalised the CA and unilaterally imposed the charges on the defendant.

[19] There is also the further issue whether the note of charges, apart from being excessive and unreasonable as contended by the defendant, should be fully borne by the defendant, or whether the plaintiff should only be paid on a quantum meruit basis or for reasonable value for services rendered.

[20] The plaintiff relied on ss 124, 126 and 128 of the LPA which provide:

> *No advocate and solicitor to sue for costs until delivery of bill of cost*
>
> 124(1) Except as authorised by this Act, no advocate and solicitor shall without the leave of the court commence or maintain any action for the recovery of any costs due for any business done by him until the expiration of one month after he has delivered to the party to be charged therewith, or sent by post to, or left with him at, his office or place of business, dwelling house or last known place of abode, a bill of costs, which bill shall be signed either by the advocate and solicitor, or in the case of a partnership, by any of the partners, either with his own name or with the name or style of the partnership or by another advocate and solicitor employed by the first-named advocate and solicitor or the partnership, or be enclosed in or accompanied by a letter, signed in the like manner, referring to the bill;
>
> *An order for taxation of costs to be made within 6 months of delivery of bill of costs*
>
> 126(1) An order for the taxation of a bill of costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery.
>
> (2) The order shall contain such directions and conditions as the court thinks proper, and any party aggrieved by any order of court may apply by summons in chambers that the same may be amended or varied or set aside.

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(3) In any case where an advocate and solicitor and his client consent to taxation of a solicitor's bill the Registrar may proceed to tax the bill notwithstanding that there is no order therefore;

Order for taxation of advocate and solicitor's bill on notice given

128(1) After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the court.

(2) No such order for taxation shall in any event be made after the expiry of one year from the delivery of the bill of costs.

[21] The plaintiff contended that under s 126(1) of the LPA, the party chargeable ie the defendant have to obtain by petition an order for the taxation of the bill. This must be done within six months from the delivery of the bill, which the defendant failed to do so. Section 128 of the LPA provides that thereafter no order shall be made for taxation of a solicitor's bill of costs except under special circumstances to be proved to the satisfaction of the court. The plaintiff further contended that it is too late now for the defendant to dispute the quantum of the bill delivered (see *Vije & Co v Co-Operative Central Bank Ltd* [1991] 3 MLJ 432 and *Tetuan Putra Gill v Hijaz Refinery (Pahang) Sdn Bhd & Anor* [2009] 7 CLJ 495).

[22] The court is of the opinion that this is not an application under O 14A of the ROC but one under O 14 r 1 of the ROC. In the light of several other triable issues raised by the defendant, it would be wrong to grant summary judgment merely based on the interpretation and application of ss 124, 126 and 128 of the LPA at this stage. In any case, it should be noted that the defendant also dispute whether the plaintiff's note of charges is a 'bill of costs' to be governed by ss 124, 126 and 128 of the LPA. Even that is an issue to be tried.

[23] It is not true that the defendant did nothing when it received the note of charges from the plaintiff. The court notes that the defendant had immediately responded to the plaintiff's letter dated 27 March 2012 on 28 March 2013 challenging the plaintiff's note of charges (see exh NE8 of the first defendant's affidavit in reply in encl 13).

[24] It is only after a full trial that the court can decide whether the defendant are precluded from applying for taxation after the six months from the delivery of the bill of costs under s 126 of the LPA, or after the expiry of six months or one year from the delivery of the bill of costs, as the case may be, under s 128 of the LPA.

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[25] Even if the defendant are precluded from applying for an order of taxation on the bill of costs under s 128 of the LPA, as contended by the plaintiff, the court would have to determine during the trial whether the amount claimed ie RM3,713,150 for 'all the work done by the firm in attending various meetings, taking instructions, drafting, discussing and amending the first, second and final draft agreements and all other work carried out on the Pagoh project' is a reasonable amount. The court has to consider this vis a vis the actual work done which according to the first defendant only involved the attendance of one workshop, five meetings and the preparation of three drafts of the proposed CA. The plaintiff has based the figure of RM3,13,150 on 0.35% of the construction costs of the project as stated in the plaintiff's quotation sent to the second defendant (exh AJ13), but this was never agreed to by the defendant.

[26] Counsel for the first defendant submitted that ZACO's bill was only for RM351,775 (exh NE9) and ZACO's appointment and fees related not only to drafting and finalising the CA but also commenting on and finalising the sale and purchase agreement dated 7 November 2012, the drafting and finalising of the lease and sublease agreements and perusing and commenting on the appointment letters for consultants, which are far in excess of the scope of work particularised by the plaintiff in the note of charges.

[27] Counsel for the plaintiff submitted that the draft Pagoh agreements prepared by the plaintiff are concession agreements between the Government of Malaysia and various institutions of higher learning, namely, the Universiti Tun Hussein Onn Malaysia and the International Islamic Universiti Malaysia. The pagoh agreements do not fall within the ambit of a fixed scale fee listed in the first, second, third nor fourth schedule of the Solicitors' Remuneration Order 2005 ('SRO') under the LPA. Instead, they are non-contentious work for which the remuneration of a Solicitor is governed by para 2(f) of the SRO and r 1 of the Sixth Schedule of the SRO.

[28] In order to determine whether the plaintiff's note of charges is reasonable, the court would have to consider the following factors laid down in r 1 of the Sixth Schedule of the SRO, namely:

(a) the importance of the matter to the client;

(b) the skill, labour, specialised knowledge and responsibility involved on the part of the solicitors;

(c) the complexity of the matter or the difficulty or novelty of the question raised;

(d) where money or property is involved, the amount or value thereof;

(e) the time expended by the solicitors; and

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A (f) the number and importance of the documents prepared or perused by the solicitors.

[29] The above can only be decided after the court hears oral evidence. This is necessary since the first defendant in its counterclaim, inter alia, is seeking, alternatively, a declaration that the alleged fees is manifestly excessive, unfair and unreasonable. It would not be possible for the court to decide what should appropriately be charged by the plaintiff merely based on affidavit evidence at this stage.

[30] In view of the several issues to be tried raised by the defendant, the court is satisfied that this case must go for trial, with witnesses from both parties being heard and cross-examined to enable the court to arrive at a just decision.

Order accordingly.

Application dismissed

Reported by Afiq Mohamad Noor